No. 84-1617

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ALABAMA PUBLIC SERVICE COMMISSION

Petitioner

V.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
and GREYHOUND LINES, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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67pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Interstate Commerce Commission can refuse to allocate expenses between interstate and intrastate bus service in intrastate rate cases under the Bus Regulatory Reform Act.

2. Whether the Interstate Commerce Commission can prescribe an intrastate bus rate increase without evidence supporting the amount of the increase.

3. Whether the Bus Regulatory Reform Act preempts state laws requiring the filing of intrastate rate reductions.

PARTIES

The caption of this petition contains the names of all parties to this action in the Eleventh Circuit. The Alabama Public Service Commission is an agency of the State of Alabama.

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ALABAMA PUBLIC SERVICE COMMISSION
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UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION
and GREYHOUND LINES, INC.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Alabama Public Service Commission respectfully petitions for a Writ of Certiorari to review the judgement of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

Neither the decision of the Interstate Commerce Commission nor the opinion of the Eleventh Circuit is reported in any official or known unofficial report.

It should be noted that another decision has been entered under the Bus Regulatory Reform Act, and a Petition for Certiorari is pending. Commissioner of Transportation v. United States, 750 F.2d 163 (2nd Cir., 1984); Petition for Certiorari pending, No. 84-1135.

JURISDICTION

The Judgment of the Eleventh Circuit was entered on February 22, 1985. No petition for rehearing was filed. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 17 of the Bus Regulatory Reform Act of 1982, 49 U.S.C. 11501(e) (1984 Supp.), provides in relevent part:

> (e)(1) The Commission shall prescribe any rate, rule, or practice applicable to transportation provided entirely in one State by a motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title --
>
> > (A) if the carrier has requested the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice for permission to establish such rate, rule, or practice and the request has been denied (in whole or in part) or the State authority has not acted finally (in whole or in part) on the request by the 120th day after the carrier made the request; and
> >
> > (B) if the Commission finds that the rate, rule, or practice in effect and applicable to such intrastate transportation causes unreasonable discrimination

against or imposes an unreasonable burden on interstate or foreign commerce

(2) For purposes of paragraph (1)B) of this subsection, there shall be a rebuttable presumption that --

(A) any rate, rule, or practice applicable to transportation provided by a motor common carrier of passengers entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds --

(i) that such rate, rule, or practice results in the carrier charging a rate for such transportation which is lower than the rate such carrier charges for comparable interstate transportation of passengers;

(ii) on the basis of evidence presented by the carrier, that as a result of such rate, rule, or practice such carrier does not receive revenues from such transportation which exceed the variable costs of providing such transportation; or

(iii) that the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice failed to act finally (in whole or in part) on the request of the carrier to establish such rate, rule, or practice by the 120th day after the date the carrier made the request; and

(B) any rate applicable to transportation entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds that the most recent general rate increase applicable to transportation provided by motor common carriers of passengers in such State is less than the most recent general rate increase applicable to interstate transportation provided by motor common carriers of passengers under this subtitle.

(3)(A) A motor common carrier of passengers must file an application with the Commission for prescription under this subsection of a rate, rule, or practice applicable to transportation provided entirely in one State by such carrier. When such application is filed with the Commission, the carrier shall certify that he has notified (i) the Governor of such

State, (ii) the department, agency, or instrumentality of such State which denied, or failed to take action on, the request of such carrier related to such rate, rule, or practice, and (iii) such other interested persons as the Commission may specify by regulation. The Commission shall take final action on any such application not later than 60 days after such application is filed with the Commission.

(B) The Commission shall establish, by regulation, procedures for processing application under this subsection.

(4) This subsection shall not apply to any carrier owned or controlled by a State or local government.

(5) No State or political subdivision thereof and no interstate agency of other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provisions having the force and effect of law relating to scheduling of interstate or intrastate transportation provided by motor common carrier of passengers subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title on an authorized interstate route or relating to the implementation of any reduction in the rates for such transportation except to the extent that notice, not in

excess of 30 days, of changes in schedules may be required. This paragraph shall not apply to intrastate commuter bus operations.

STATEMENT OF THE CASE

After the Alabama Public Service Commission (APSC) denied its rate increase application, Greyhound Lines, Inc. (Greyhound) petitioned the Interstate Commerce Commission for the increase. Greyhound alleged that its Alabama intrastate rates, both before and after the increase, would be lower than comparable interstate rates. Greyhound also filed the state record. It showed, for the pro forma year, a Greyhound system (East) operating ratio of 96.26%, an Alabama (combined interstate and intrastate) operating ratio of 101.28%, and an Alabama intrastate operating ratio of 90.39%. The proposed rate increase would reduce the Alabama intrastate operating ratio to 84.91%. The state record also showed

that intrastate fares were and would be lower than interstate fares between selected pairs of Alabama cities.

The APSC moved to dismiss Greyhound's petition and filed a reply. Attached to these documents was Greyhound's Alabama intrastate reduced fare tariff filed within 3 days of the petition. The APSC contended that the lower intrastate operating ratio and the intrastate reduced fare tariff showed the absence of a burden on interstate commerce; and no evidence supported the amount of rates sought.

Greyhound filed rebuttal, alleging that operating ratios are a relic of another era, no differences in operating conditions, services or costs were established, and the reduced fare tariff was filed for marketing and competitive reasons.

The Interstate Commerce Commission denied the motion to dismiss and granted Greyhound's petition. The contemporaneous West Virginia rate case, MC-C-10901, was cited as authority for rejecting operating ratios, and the increase requested was granted without discussion of the amount. In the West Virginia rate case, the Interstate Commerce Commission stated:

> " The calculation of intrastate versus combined operating ratios involves a number of highly arbitrary accounting assumptions for allocating the revenues and especially the expenses between interstate and intrastate service. The essence of the problem is that both types of service are provided simultaneously on the same bus and by the same personnel: a given bus typically contains both interstate and intrastate passengers. There is no non-arbitrary method of allocating the common costs of providing these two types of service." (Appendix, page 24a)

On appeal, the Eleventh Circuit affirmed without an opinion. The jurisdiction of the Eleventh Circuit was invoked pursuant to 28 U.S.C. 2342(5).

REASONS FOR GRANTING THE WRIT

BACKGROUND

(A) Overview of the Bus Regulatory Reform Act.

In August, 1982, Congress addressed the problems it found in the bus industry by passing the Bus Regulatory Reform Act of 1982, Public Law 97-261, 96 Stat.1102 (1982). (Bus Act). This Act adopts a two pronged approach: reduction of federal regulation and selective preemption of state regulation. Federal regulation is reduced by easing entry (Section 6 of the Bus Act, 49 U.S.C. 10922(c)), and by establishing a zone of rate freedom (Section 11 of the Bus Act, 49 U.S.C. 10708(d)(4) & (5)). Selective state

preemption was adopted by authorizing the Interstate Commerce Commssion to approve intrastate service (Section 6 of the Bus Act, 49 U.S.C. 10922(c)(2)(A) and (B)), by authorizing the Interstate Commerce Commission to approve abandonment of intrastate service (Section 16 of the Bus Act, 49 U.S.C. 10935), and by authorizing the Interstate Commerce Commssion to prescribe intrastate rates. (Section 17 of the Bus Act, 49 U.S.C. 11501(e)(1) - (3). State action on time schedule changes and rate reduction filings was also prohibited. (Section 17 of the Bus Act, 49 U.S.C. 11501(e)(5)).

Intrastate bus rates are to be prescribed by the Interstate Commerce Commission if the state agency does not act within 120 days on a rate filing or denies a rate filing, and the intrastate rates discriminate against or unreasonably bur-

den interstate or foreign commerce. 49 U.S.C. 11501(e)(1). Discrimination against interstate or foreign commerce must be proven in all cases, but rebuttable presumptions are provided for unreasonable burdens on interstate or foreign commerce. 49 U.S.C. 11501(e)(2).

(B) Federalism

Concepts of federalism have an impact in this case. These concepts arise from the fact that this country does not have a centralized government with political subdivisions. Instead, the Constitution of the United States established a system of government consisting of a national government and sovereign state governments. These concepts underly the Tenth Amendment and are implicit elsewhere. Thus, in Article IV, state institutional integrity is recognized (Section 1), state territorial integrity is recognized

(Section 3), and the sovereign power of elected state representatives is recognized (Section 4). In addition, concepts of federalism are recognized in this court's decisions. Community Communications Co. v. City of Boulder, 455 U.S. 40, 53 (1982); Parker v. Brown, 317 U.S. 341, 359 (1943).

As applied to this case, concepts of federalism create deference for the states. LaFayette v. Louisiana Power & Light Co., 435 U.S. 389, 412 (1978). Restrictions upon the traditional power of states to regulate their local transportation are confined to the plain mandate of Congress. Palmer v. Commonwealth of Massachussetts, 308 U.S. 79, 84 (1939). Finally, when the federal government must act in intrastate transportation, the justification for the exercise of the federal power must be made definitely and clearly

apparent. Chicago M. St. P. & P. R. Co. v. Illinois, 355 U.S. 300, 306 (1958).

ALLOCATION OF EXPENSES

Under the Constitution of the United States of 1787, Congress has the power to regulate commerce among the several states, and to make all laws which shall be necessary and proper for carrying into execution this power. (Article I, Section 8). Laws made pursuant to the Constitution are the supreme law of the land. (Article VI). These provisions also give the federal government the power to alter intrastate rates in some cases. Houston, East & West Texas Railway Company v. United States, 234 U.S. 342 (1914).

This power to alter intrastate rates has been explored and developed in connection with rail rates. It was there established that the level of intrastate rates unreasonably burden interstate com-

merce, and the federal government can alter intrastate rates, when intrastate operations do not contribute a fair share of revenue needs for the interstate carrier. Public Service Commission of Utah v. United States, 356 U.S. 421, 424 & 425 (1958); King v. United States, 344 U.S. 254, 270-271 (1952); North Carolina v. United States, 325 U.S. 507, 520 (1945). In addition, a high standard was required, with clear justification for federal interference in intrastate rates. Chicago, M. St. P. & P. R. Co. v. Illinois, 355 U.S. 300, 306 (1958).

The lack of a fair contribution to net revenue must be established by allocating investment and expenses between the federal and state jurisdictions. Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 588 - 589 (1945); Smith v. Illinois Bell Telephone Co., 282

U.S. 133, 150 (1930); The Minnesota Rate Cases, 230 U.S. 352, 461 (1913); New York Telephone Company v. Federal Communications Commission, 631 F.2d 1059, 1062 (2nd Cir, 1980). With the railroads, this allocation process produced operating ratios that could be compared. Public Service Commission of Utah v. United States, 356 U.S. at 426; King v. United States, 344 U.S. at 262-263. A lower intrastate operating ratio shows that a smaller percentage of revenue was consumed by expenses. Public Service Commission of Utah v. United States, 356 U.S. at 426; D. C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission, 350 F.2d 753, 757 & 759 (D.C. Cir., 1965). Therefore, it is submitted, a lower intrastate operating ratio shows that intrastate operations were more profitable, and do not burden interstate commerce.

These principles were adopted by Congress in the Bus Act by the use of the term "unreasonable burden on interstate Commerce." 49 U.S.C. 11501(e)(2)(A). Nevertheless, the Interstate Commerce Commission refused to consider operating ratios because they involve the allocation of expenses. Instead, it simply granted the petition for an increase in intrastate rates.

This court should hear this case, and reverse the Eleventh Circuit's affirmance of the Interstate Commerce Commission's Decision, for two reasons. First, this case presents an important question of federal law that has not been, but should be, settled by this court. This court has not reviewed an intrastate rate case under the Bus Act. Second, by affirming the Interstate Commerce Commission Decision, the Eleventh Circuit has sanctioned a

departure from this court's decisions. This Court has established criteria for determining, on a case by case basis, when the level of intrastate rates unreasonably burden interstate commerce, but the Interstate Commerce Commission's Decision refuses to apply these criteria.

It has been acknowledged that separations of intrastate and interstate costs and revenues are not required where the conditions are substantially the same. Illinois Commerce Commission v. United States, 292 U.S. 474, 483-484 (1934). The Interstate Commerce Commission stated that the same equipment and personnel provide both intrastate and interstate service at the same time. This is not always true, however, as shown by Greyhound's Birmingham - Atlanta operations. (Appendix, page 34a) In operations between Birmingham and Anniston, the bus and driver provide both services, but on the Alabama miles between

Anniston and the state line only interstate service is provided.1/ In addition, all Alabama mileage provides only interstate service on the express run from Birmingham to Atlanta. Therefore, an interstate fare must cover the less profitable interstate only service as well as the more profitable joint servdice, but an intrastate fare need only cover the more efficient joint service. Consequently, conditions are not substantially the same for interstate and intrastate bus service.

The Interstate Commerce Commission's statement that the same equipment and personnel provide both services also shows the importance of this case. The Commission is indicating its conviction that intrastate rates should be the

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1/ An exception occurs on the one run each way that stops in Heflin, Alabama.

same as interstate rates. Therefore, it will systematically ignore state commission decisions and systematically grant intrastate bus rate increases. In the process, it will have made irrebuttable the rebuttable presumption of an undue burden on interstate commerce. (49 U.S.C. 11501(e)(2)(A)) and will have ignored the decisions of this Court.

AMOUNT OF THE RATE INCREASE

The Bus Act provides a rebuttable presumption that lower intrastate rates unreasonably burden interstate commerce. 49 U.S.C. 11501 (e)(2)(A)(i). If a finding of an unreasonable burden on interstate commerce is made, the Interstate Commerce Commission is to prescribe the intrastate rates. 49 U.S.C. 11501 (e)(1). The Interstate Commerce Commission, however, simply granted Greyhound's proposed

rate because the proposed rate is lower than the interstate rate.

Congress did not direct the Interstate Commerce Commission to set intrastate rates at the interstate level, nor to allow rate freedom if the intrastate rates are below the interstate rates. Therefore, the Interstate Commerce Commission must have a rational basis, and evidence to support, the intrastate rates it prescribes. Public Service Commission of Utah v. United States, 356 U.S. at 428; North Carolina v. United States, 325 U.S. at 512. Consequently, the Interstate Commerce Commission Decision, and the Eleventh Circuit affirmance, conflicts with the decisions of this court. In addition, the intrastate bus rate prescription question is an important one that has not been, but should be, settled by this court. Indeed, the unsupported approval

of the rates sought, after denial by the state Commission, is an abandonment of federalism considerations, and at least should not receive judicial sanction without thorough consideration. Therefore, this point should be considered by this court, and the Eleventh Circuit should be reversed.

INTRASTATE RATE REDUCTION FILINGS

This court has consistently held that state preemption is limited to the clear and manifest intention of Congress. Ray v. Atlantic Richfield Company, 435 U.S. 151, 157 (1978); James v. Rath packing, 430 U.S. 519, 525 (1977); Palmer v. Commonwealth of Massachussetts, 308 U.S. 79, 84 (1939). The Bus Act prohibits state action on filings for bus rate reductions, but does not exempt the bus lines from state laws requiring that rates be filed. 49 U.S.C. 11501 (e)(5). Nevertheless, the

Interstate Commerce Commission Decision holds that intrastate rate reductions are not required to be filed with the states. (Appendix, page 6a (footnote)). This decision, and the Eleventh Circuit's affirmance, is thus contrary to this court's decisions. In addition, this point should be addressed by this court because of the states' interest in having only filed rates charged by the bus lines.

THE NEW YORK CASE

The Second Circuit Court of Appeals has issued its opinion rejecting operating ratios and allocation of expenses. Commissioner of Transportation v. United States, 750 F.2d 163, 170 (2nd Cir., 1984). That opinion is not persuasive for two reasons. First, it is contrary to this court's decisions, and does not show that the decisions requiring allocation of expenses (Supra, pg 15-16) were considered.

Second, the rejection of operating ratios and allocation of expenses was not required to decide that case because the intrastate operating ratio was higher. 75 F.2d at 165 & 170.

CONCLUSION

This court has recently recognized concepts of federalism, and held that these concepts are normally protected by the political process. Garcia v. San Antonio Metropolitan Transit Authority, U.S., 105 S. Ct. 1005 (1985). As shown hereinabove, these concepts are to be applied when a federal agency sets intrastate rates on a case by case basis. The Interstate Commerce Commission, however, has failed to recognize these concepts, and has failed to follow the decisions of this court, in its review and approval of intrastate bus rates. This action has now been approved by the Eleventh Circuit. Consequently, Petitioner prays that a Writ

of Certiorari will be issued to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

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Alabama Rate Case	2a
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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 84-7374

ALABAMA PUBLIC SERVICE COMMISSION,

Petitioner,

versus

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

GREYHOUND LINES,

Intervenor.

Petition for Review of an Order of the
Interstate Commerce Commission

(February 22, 1985)

Before HENDERSON and HATCHETT, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25

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*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-10904

PETITION OF GREYHOUND LINES, INC., FOR REVIEW OF A DECISION OF THE ALABAMA PUBLIC SERVICE COMMISSION PURSUANT TO 49 U.S.C. 11501

Decided: May 16, 1984

By petition filed March 20, 1984 Greyhound Lines, Inc.(Greyhound or petitioner) seeks review pursuant to 49 U.S.C.11501(e) of a decision of the Alabama Public Service Commission (Alabama or State) which denied Greyhound's proposed intrastate fare increases. Petitioner asserts that the denial of its request causes unreasonable discrimination against, and imposes an unreasonable burden on, interstate commerce. Greyhound requests that this Commission review the record and prescribe fares at the level originally proposed by petitioner. Alabama has replied to the petition, and Greyhoud filed rebuttal.

This petition is filed under Section 17 of the Bus Regulatory Reform Act of 1982 (Bus Act), Pub. L. 97-261, 96 Stat. 1102, codified at 49 U.S.C. 11501(e). Section 17 permits an interstate motor common carrier of passengers to seek this Commission's review of: (1) a State decision resulting in intrastate rates, rules, or practices which unreasonably discriminate against, or impose an unreasonable burden on, interstate or foreign commerce; or (2) a State's failure to act within 120 days on a carrier's request for permission to establish a rate, rule, or practice. Regulations to implement Section 17 were adopted in Ex Parte No. MC-160, Procedures for Review of Intrastate Bus Rates, 133 M.C.C. 10 (1982), and are codified at 49 CFR 1143.

PRELIMINARY MATTERS

Alabama has filed a motion to dismiss the petition based upon Greyhound's filing on March 23, 1984 of reduced rates for its intrastate movements. Alabama claims that Greyhound's filing of reduced intrastate fares establishes the absence of a burden on or discrimination against interstate commerce, and that the issues raised in the petition are effectively moot. Greyhound states that, contrary to Alabama's allegations, this proceeding is not moot because the fares referred to were initiated for marketing and competitive reasons, and represent only one-tenth of one percent of Greyhound's existing Alabama service offerings. We deny Alabama's motion to dismiss bescause the presumptions made by Alabama are erroneous and unsupported by the weight of the evidence.

BACKGROUND

On October 14, 1983, Greyhound, through its agent the National Bus Traffic Association, Inc., filed an application with Alabama seeking to increase its intrastate passenger fares by 20 percent on its Alabama intrastate movements. On November 10, 1983, the State entered its order suspending the request and deferring any rate increase until January 11, 1984, and scheduling Greyhound's rate request for hearing on December 14, 1983. On January 6, 1984, the State entered another order extending the suspension period and deferring any rate increase to February 24, 1984.

By order dated February 13, 1984, Alabama denied Grehound's rate increase. In its decision, Alabama concluded that Greyhound did not produce any evidence to demonstrate a need for increasing its present Alabama intrastate fares based upon either future or present

operating costs. Additionally, because Greyhound had reduced its fares on intrastate operations, Alabama presumed that any intrastate fare Greyhound charged was sufficient to sustain a profitable operation. In addition, the State concluded that carriers are required to file reduced rate publications involving intrastate fares with the applicable state regulatory agency, and directed Greyhound to do so.*/

CONTENTIONS OF THE PARTIES

Greyhound here petitions the Commssion to review the State decision denying its proposed intrastate rate increases. Petitioner claims

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*/ This conclusion is incorrect. Under the Bus Act, State Regulatory agencies no longer have jurisdiction over intrastate rate reductions except to the extent that they may require 30-days notice of changes in schedules. They may not, however, require carriers to file reduced rate publications with them. 49 U.S.C. 11501(e)(5).

that it is being victimized by its inability to charge intrastate rates that are commensurate with its interstate rates for comparable movements. It maintains that the sought increases merely represent an attempt to overcome an existing artificially depressed level of rates. Greyhound further states that Alabama failed to act on the requested rate increase within the 120-day statutory period. It also points out that under 49 U.S.C. 11501(e)(2)(A)(i), where an intrastate rate is lower than a comparable interstate rate, a rebuttable presumption arises that the intrastate rate causes unreasonable discrimination against and imposes an unreasonable burden on interstate commerce. It argues that Alabama's failure to grant the requested increases on its intrastate routes, where significant interstate-intrastate rate disparities are present, results in just such a burden. Greyhound submits a comparison chart which illustrates a

30 to 37 percent disparity between its intra state rates and its interstate rates for the same passenger service between selected points in Alabama. As an example, Greyhound's intrastate rate for travel between Birmingham and Montgomery is $13.20 while its interstate rate is $18.05. Similarly, its intrastate rate for travel between Mobile and Selma is $20.45 while its interstate rate is $28.15. Petitioner further avers that its proposed 20 percent increase will still leave its intrastate rates 10 to 12 percent below the comparable interstate rates.

In reply, Alabama restates its argument made at the State level that the operating ratio statistics indicate that Greyhound's intrastate operations are profitable. Based on this, it claims that it has rebutted the 49 U.S.C. 11501(e)(2)(A)(i) presumption relied on by petitioner. It also contends that, rather than burdening interstate commerce, Greyhound's intrastate fares actually subsidize

interstate fares. It further asserts that in recent filing for intrastate rate reductions, Greyhound, in effect, admitted that the company's intrastate rates do not burden interstate commerce.

The State does, however, concede that a comparison of intrastate and interstate fares between selected pairs of Alabama cities shows that increases ranging from 30.48 percent to 37.81 percent would be needed to bring the intrastate fares up to the interstate fares and that the proposed increase would result in intrastate fares ranging from 87.05 percent to 91.59 percent of the interstate fares.

In its rebuttal statement, Greyhound states that the use of operating ratios as indicators of profitability is misleading and antiquated. It avers (i) that operating ratios reflect a purely mathematical allocation of certain expenses to revenues; (ii)

that the methodology used to compute intrastate operating ratios is deeply rooted in the State's historic administrative practice and its rules and regulations; and (iii) that operating ratios do not reflect actual or anticipated real world financial performance. Therefore, Greyhound submits that operating ratio analysis, particularly pro forma analysis based on the State's procedures involving intrastate rate increases, is an inadequate and unrealistic basis for rebutting the presumption set forth at 49 U.S.C. 11501(e)(2)(A)(i).

DISCUSSION AND CONCLUSIONS

After full consideration of the State record and decision, and of the pleadings filed before us, we conclude that Alabama's denial of petitioner's proposed fare increases on its Alabama routes results in intrastate rates which cause unreasonable discrimination

against, and impose an unreasonable burden on, interstate commerce. Accordingly, we approve the sought increases on these routes.

Subsection 11501(e)(2)(A)(i) establishes a rebuttable presumption that a rate, rule, or practice applicable to intrastate transportation of passengers unreasonably burdens interstates commerce if it results in the carrier charging an intrastate rate which is lower than the rate applicable to comparable interstate service. The record clearly establishes that Greyhound's intrastate passenger fares, even at the proposed level, are significantly lower than comparable interstate fares. Protestant has not shown ay differences in operating conditions, services, or costs between intrastate and interstate operations that would justify the disparity in applicable fares and rebut the statutory presumption. Alabama argues in its reply that various operating ratios indicate that approval of the requested increase is not warranted. As we

explained at length in MC-C-10901, Petition of Greyhound Lines, Inc. for Review of a Decision of the West virginia Public Service Commission Pursuant to 49 U.S.C. 11501, served April 18, 1984, the calculation of intrastate versus interstate operating ratios on mixed operations involves arbitrary accounting assumptions. For the same reasons explained in the cited decision we do not find these calculations sufficiently reliable enough to rebut the statutory presumption raised by the rate discrepancies. By contrast, Alabama concedes that intrastate fares are below comparable interstate fares. This continued rate discrepancy results in subsidization of Alabama intrastate operations by interstate Alabama operations, representing an unreasonable burden on interstate commerce.

Accordingly, Greyhound's showing that its intrastate rates are lower than comparable interstate rates, and thus burdensome on interstate commerce, stands unrebutted. We, there-

fore, will prescribe the sought intrastate passenger fare increase of 20 percent.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

We find:

The Alabama Public Service Commission decision of February 13, 1984, results in intrastate rates and fares which cause unreasonable discrimination against, and impose an unreasonable burden on, interstate commece. Implementation of the increases sought by Greyhound will remove this unreasonable discrimination and burden.

It is ordered:

The motion to dismiss the petition is denied.

The relief sought in the petition is granted. Greyhound is authorized to put into effect the increases in Alabama intrastate passenger fares proposed in Docket No. 18911 filed with the Alabama Public Service commisison on October 14, 1983.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett and Gradison. Chairman Taylor concurred.

James H. Bayne

(SEAL) Secretary

INTERSTATE COMMERCE COMMISSION

No. MC-C-10901

PETITION OF GREYHOUND LINES, INC.,
FOR REVIEW OF A DECISION OF THE
WEST VIRGINIA PUBLIC SERVICE COMMISSION
PURSUANT TO 49 U.S.C. 11501

Decided: April 13, 1984

Petitioner granted relief from a decision of the West Virginia Public Service Commission (WVPSC). The WVPSC decision denied petitioner's request for a rate increase for the intrastate transportation of passengers and newspapers.

Anthony P. Carr and Lat J. Clemins for petitioner.

Robert R. Rodecker and S. Thornton Cooper for WVPSC.

DECISION

BY THE COMMISSION:

By petition filed February 13, 1984, Greyhound Lines, Inc., (Greyhound or petitioner) seeks review pursuant to 49 U.S.C. 11501(e) of a decision of the West Virginia Public Service Commission (WVPSC) which denied petitioner's application to increase its intrastate passenger fares and newspaper rates. Greyhound asserts that the existing West

Virginia intrastate rates impose an unreasonable burden on interstate commerce and requests this Commission to prescribe rates for the involved intrastate service at the level sought before the WVPSC. WVPSC has responded to the petition, and Greyhound filed a rebuttal statement.

The petition is filed under Section 17 of the Bus Regulatory Reform Act of 1982 (Bus Act), Pub. L. 97-261, 96 Stat. 1102, codified at 49 U.S.C. 11501(e). Section 17 permits an interstate motor common carrier of passengers to seek this Commission's review of: (1) a State decision resulting in intrastate rates, rules, or practices which unreasonably discriminate against, or impose an unreasonable burden on, interstate or foreign commerce; or (2) a State's failure to act within 120 days of a carrier's request for permission to establish a rate, rule or practice. Regulations implementing this new law were adopted

in Ex Parte No. MC-160, Procedures for Review of Intrastate Bus Rates, 133 M.C.C. 10 (1982), and are codified at 49 CFR 1143.

BACKGROUND

On September 27, 1983, Greyhound filed an application with the WVPSC seeking to increase intrastate passenger fares an average of 14.8 percent over existing fares. Fares on individual routes would be increased by percentages ranging from 0.0 percent (Ansted to Big Creek) to 34.1 percent (Gauley Bridge to Mt. Hope), in each case equalizing the fares to comparable interstate fares. In addition, Greyhound proposed to increase rates for the intrastate transportation of newspapers by approximately 25 percent, or to the same level as the interstate rates for such shipments. Finally, Greyhound seeks to eliminate the multi-ride discount on intrastate fares, since there are no such discounts on interstate fares, thereby equalizing such fares.

According to Greyhound's projections, the entire Greyhound System (East) should have an operating ratio of 95.82 for the twelve months ending April 30, 1984, based on adjustments to the figures for the twelve months ending April 30, 1984. Greyhound projects an operating ratio of 107.41 for the 12 months ending April 30, 1984, for its combined intrastate and interstate West Virginia operations. Greyhound's projected West Virginia intrastate figure for that same period is an operating ratio of 94.43.

Greyhound noted the disparity between current intrastate rates and the rates for comparable interstate service. Its comparison of representative interstate and intrastate passenger fares between selected city pairs shows that intrastate fares would have to be increased by varying amounts from zero to 34.1 percent (averaging 14.9 percent) to equal comparable interstate passenger fares. Simi-

larly, the multi-ride intrastate discount would need to be eliminated, since no such discount applies to interstate fares. Finally, newspaper rates would have to be increased by 25 percent to equal comparable interstate rates.

A hearing was held before the WVPSC on December 12, 1983. WVPSC issued a final decision denying the proposed increase on Janaury 26, 1984. WVPSC noted that Greyhound's West Virginia intrastate operating ratio (94.43) is lower than its overall West Virginia operating ratio (107.41), and therefore concluded that because Greyhound's intrastate operations are more profitable, intrastate operations are not being subsidized by interstate operations.

In its petition for review of the State decision, Greyhound invokes the presumption set forth at 49 U.S.C. 11501(e)(2)(A)(i). Specifically, Greyhound claims that because its West Virginia intrastate rates are lower

than its rates for comparable interstate transportation of passenges and newspapers between the same points, a rebuttable presumption is created that such intrastate rates impose an unreasonable burden on interstate commerce.

Greyhound contends that, at the time of its request, there was a disparity between its intrastate and interstate passenger and newspaper rates for comparable service on a statewide basis, and that even with approval of the sought intrastate increases, its intrastate rates would merely equal its interstate rates. Greyhound further argues that subsidization of intrastate passenger fares by interstate passengers traveling between the same points creates an unreasonable burden on interstate commerce.

In response to the petition, WVPSC contends that where the sole issue is the disparity of rates between intrastate and interstate service, once it has been established that the overall operations of Grey-

hound in West Virginia are profitable and that the intrastate operations of Greyhound are more profitable than the interstate operations, the presumption of 49 U.S.C. 11501(e)(2)(A)(i) has been rebutted. The carrier then has the burden of establishing that the lower intrastate rates create a burden on interstate commerce and that such burden is unreasonable.

In rebuttal, Greyhound questions WVPSC's method of calculating petitioner's projected intrastate operating ratio. Regardless, it asserts that evidence regarding operating ratios is insufficient to rebut the presumption set forth in subsection 11501(e)(2)(A)-(i).

DISCUSSION AND CONCLUSIONS

Upon full consideration of the record and of the pleadings filed in this proceeding, we conclude that the denial by the WVPSC of Greyhound's proposed increases results in intrastate rates which cause unreasonable dis-

crimination against, and impose an unreasonable burden upon, interstate commerce. Accordingly, we approve the increases in intrastate passenger fares and newspaper rates sought by Greyhound.

Subsection 11501(e)(2)(A)(i) establishes a rebuttable presumption that a prescribed rate, rule, or practice applicable to intrastate transportation of passengers unreasonably burdens interstate commerce if it results in the carrier charging an intrastate rate which is lower than the rate applicable to comparable interstate service. The record clearly establishes that Greyhound's present intrastate passenger fares and newspaper rates are lower than comparable interstate rates and that, at the proposed level, they would merely equal comparable interstate rates. The record does not reveal any differences in operating conditions, services, or costs between intrastate and interstate operations which would

justify the disparity in applicable fares and rebut the statutory presumption. This continued rate discrepancy results in subsidization of West Virginia intrastate operations by interstate operations, representing an excessive and undue burden on interstate commerce.

WVPSC argues that Greyhound's West Virginia intrastate operations are more profitable than its interstate operations, and thus that the lower intrastate rates do not burden interstate commerce. WVPSC bases this argument on calculations which show a West Virginia intrastate operating ratio of 94.43 versus a West Virginia state (combined interstate and intrastate) operating ratio of 107.4 for the "going level" year. We do not accept these calculations as sufficiently reliable to rebut the statutory presumption, for the reasons explained below.

The calculation of intrastate versus combined operating ratios involves a number of highly arbitrary accounting assumptions for allocating the revenues and especially the expenses between interstate and intrastate service. The essence of the problem is that both types of service are provided simultaneously on the same bus and by the same personnel; a given bus typically contains both interstate and intrastate passengers. There is no non-arbitrary method of allocating the common costs of providing these two types of service. In this case, WVPSC relies on calculations made by Greyhound according to WVPSC rules. Greyhound allocated expenses in proportion to the number of passenger miles of each type of service. Thus, because 27.68 percent of the passenger miles were generated by intrastate passengers, 27.68 percent of the expenses were allocated to intrastate service. This is the customary method used to allocate

expenses, and it normally produces a reasonable result.

In this case, however, this allocation method produces an economically absurd and unreasonable result. Intrastate rates, which are significantly below interstate levels, are shown as apparently more profitable than interstate rates. And yet the combined operating ratio shows a significant loss. Thus, the lower rates appear to be more profitable than the higher rates on the same buses. The appearance is deceptive and a result of the arbitrary, albeit traditional, method of allocating common costs between the two types of service.

The principal root of this error is that typically intrastate passenger trips are significantly shorter than interstate trips. It is well known that the costs of transportation by bus and by virtually every other mode are not directly proportional to length of haul,

but that costs per mile for short trips are typically much higher than for long trips. This reflects the influence of costs of ticketing, baggage handling, other station expenses, and other expenses which do not vary significantly (or at least not proportionally) with the length of the trip. This in turn is reflected in the rate structure for bus and virtually all other forms of transportation: rates or fares per mile are typically much higher for short trips than for long trips. The higher short haul rates or fares per mile reflect the fact that short haul costs per mile are significantly higher.

We have recognized in previous cases under the Bus Act that this "taper" of costs and fares per mile must be considered. For example, in No. MC-C-10891, Petition of Trailways Lines, Inc., et al., For Review of a Decision of the Railroad Commission of Texas Pursuant to 49 U.S.C. 11501, served January

31, 1984, objectors argued that intrastate revenues were higher than interstate revenues per mile; but failed to recognize the substantial differences in length of haul. We said there (at 6) that comparisons of revenue per mile do not determine relative profitability (of intrastate versus interstate service) absent a similar comparison of costs per mile. In No. MC-C-10893, Petition of Greyhound Lines, Inc., For Review of a Decision of the Railroad Commission of Texas Pursuant to 49 U.S.C. 11501, served February 21, 1984, objectors made the same argument that intrastate revenues per passenger mile were higher than interstate levels, comparing intrastate trips with interstate trips of much greater average length. We said (at 5) "We do not consider this to be 'comparable transportation' within the meaning of the statute, particularly as it is well known that costs per passenger mile decline significantly with trip length."

In this case, the sharp difference in length of haul is reflected in the fact that intrastate revenue per passenger mile is approximately $0.1206, in contrast to interstate revenue per passenger mile of approximately $0.1073.1/ This is despite the fact that intrastate rates are an (unweighted) average of 14.8 percent lower than the corresponding interstate rates. Yet the cost allocation procedure used to produce the intrastate operating ratio assumes that intrastate passenger miles are no more costly to produce than (that is, have the same characteristics as) interstate passenger miles. This is the source of the anomalous result that lower fares appear to be contributing more than higher fares on the same bus.

1/ Derived from Greyhound's Exhibit No. 3 and Exhibit No. 5 before WVPSC.

Although there is no entirely non-arbitrary method of allocating common costs between two services produced simultaneously, some methods may be more reasonable than others. In this case, because short haul trips are much more costly (per mile) to produce than longer haul trips, and because the fare structure reflects this difference in cost per mile (although perhaps not perfectly), an allocation of expenses in proportion to revenue would arguably be more reasonable, or less arbitrary, than the allocation in proportion to passenger miles on which WVPSC relies. The underlying problem here is that the distinction between intrastate and interstate service on the same bus at the same time is highly artificial. Thus, any attempt to calculate an intrastate operating ratio on mixed operations is unavoidably a meaningless exercise.

For example, if we were to allocate expenses in proportion to revenues rather than in proportion to passenger miles, on the grounds that such an allocation is more likely to reflect actual cost patterns, the apparently lower intrastate operating ratio would disappear. Both the intrastate and interstate operating ratios would be approximately equal to 107.4.2/ This result would cure the offense

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2/ In fact, arguably, expenses could more reasonably be allocated in proportion to the revenues which would have been earned if the intrastate fares had been equal to interstate levels. This would reflect the likelihood that interstate fare patterns more accurately reflect differences among routes than the intrastate rates which have been artificially suppressed in many cases through discriminatory state regulatory rules, as recognized by Congress in the passage of the Bus Act. Such an alternative allocation would show a much higher operating ratio for intrastate service than for interstate service. This may be a more accurate reflection of the reality. Such an allocation would be at least as reasonable as either of the two alternatives described above.

against common sense which otherwise results from the traditional, but highly artificial, distinctions and arbitrary accounting procedures used to produce the operating ratio of which WVPSC relies.

Thus we find that WVPSC has not shown that intrastate rates are subsidizing interstate service, and that WVPSC has not successfully rebutted the presumption that the rate disparity imposed an unreasonable burden on interstate commerce.

Accordingly, Greyhound's showing that its intrastate rates are lower than comparable interstate rates, and thus burdensome to interstate commerce, stands unrebutted. We, therefore, will prescribe the sought intrastate passenger fare and newspaper rate increases of 14.8 percent and 25 percent, respectively, as well as elimination of the intrastate multi-ride discount.

Other arguments raised by the parties are not relevant to our determination here and will not be discussed.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

We find:

The WVPSC decision of January 26, 1984, results in intrastate rates and fares which cause unreasonable discrimination against, and impose an unreasonable burden on, interstate commerce. Implementation of the increases sought by Greyhound will remove this unreasonable discrimination and burden.

It is ordered:

Greyhound is authorized to put into effect the increase in West Virginia intrastate rates proposed to the WVPSC in M.C. case No. 21997.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett and Gradison. Chairman Taylor concurred. Commissioner Gradison did not participate.

James H. Bayne

(SEAL) Acting Secretary

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